

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Consumers Energy Company

Project Nos. 2436-174,
2447-166, 2448-170,
2449-146, 2450-145,
2451-143, 2452-150,
2453-172, 2468-147,
2580-200, 2599-164

ORDER ON REHEARING

(Issued June 11, 2003)

1. On March 11, 2003, Commission staff issued an order¹ modifying and approving licensee Consumers Energy Company's (Consumers) fiscal year (FY) 2003 expenditures under various funding provisions of its licenses. The Michigan Department of Natural Resources (Michigan DNR) filed a timely request for rehearing and clarification with respect to the licensee's contributions to the State of Michigan Habitat Improvement Account (Habitat Account).² As described below, we are clarifying that the March 11 order pertains to FY 2003 contributions only. In addition, we are amending the order to require Consumers to file for Commission approval its proposed FY 2003 contributions to Habitat Account in accordance with the conditions of its licenses.

¹102 FERC ¶ 62,162 (2003).

²As an agency to be consulted with respect to the Habitat Account spending plans required by these licenses, Michigan DNR's motion to intervene filed with its rehearing request is timely under the Commission's policy articulated in *Pacific Gas and Electric Company*, 40 FERC ¶ 61,305 (1987). On April 24, 2003, Consumers filed an answer to the request for clarification.

BACKGROUND

2. In 1994, pursuant to a settlement agreement among Consumers, Michigan DNR, and others,³ Consumers was issued eleven new licenses for the continued operation of its hydroelectric projects, all of which are located in Michigan on the AuSable, Manistee, and Muskegon Rivers.⁴ The eleven licenses require funding to be provided by Consumers annually for specified activities. One of these funding provisions, contained in Article 409 of the licenses, requires Consumers to make specified annual contributions (adjusted with the Consumer Price Index) to the Habitat Account.⁵

3. On October 1 of each year, Consumers submits for Commission approval its proposed contributions for the fiscal year that is just beginning. Payment of the approved amounts is due the following October 1 (i.e., for the previous 12-month period). The Article 409 contributions to the Habitat Account were calculated based on fish entrainment and mortality studies conducted by Consumers in 1991 in connection with its relicense applications for the eleven projects.

4. In 1999, Consumers conducted a study at the Foote Project No. 2436 to determine the effectiveness of fish screens in reducing turbine mortality. In 2001, the Commission accepted the study's finding that, with or without fish screens, entrainment mortality at the Foote Project is much lower than the 1991 studies had indicated. Accordingly, it reduced the Foote Project's Article 409 contribution to the Habitat Account from \$210,180 to \$3,100 (in year 2000 dollars).⁶ For Consumers' ten other projects, it must pay the amounts

³Other signatories to the Settlement Agreement were the U.S. Forest Service, U.S. Fish and Wildlife Service, and Michigan Hydropower Reform Coalition.

⁴See 68 FERC ¶ 61,077 (Settlement Order).

⁵The Habitat Account funds are used for a variety of mitigation and enhancement purposes related to the operation of Consumers' projects.

⁶95 FERC ¶ 62,048, at p. 64,069, Ordering paragraph (A) (2001), order on rehearing, 95 FERC ¶ 61,394 (2001). Subsequently, the Commission applied the reduction retroactively, crediting Consumers with an overpayment for its FY 1999 contribution for the Foote Project. 98 FERC ¶ 61,150 (2002). The change in the Foote Project's contribution decreased the total Habitat Fund contribution from \$705,738 to \$498,658 (year 2000 dollars).

specified in Article 409 of the licenses until such time as it requests, and we approve, amendment applications for those projects.⁷

5. On October 1, 2002, as supplemented November 14, 2002, Consumers filed for Commission approval of its proposed expenditures for FY 2003, including Article 409 payments to the Habitat Account. With respect to the Habitat Account, Consumers proposed a \$3,500 contribution, the amount due for the Foote Project. Claiming uncertainty as to the level of contributions for the 10 other projects (in light of its April 30, 2002 amendment applications), Consumers requested an extension of time to submit the Article 409 portion of its proposed FY 2003 expenditures for the ten projects until 30 days after the Commission issues orders on Consumers' pending amendment requests. The March 11, 2003 order approved the proposed funding payments and granted the requested extension.

DISCUSSION

6. On rehearing, Michigan DNR argues that there is not, as Consumers contends, any uncertainty as to the amounts to be paid to the Habitat Account under Article 409 of the licenses. Only the amount owed for the Foote Project has been reduced; Article 409 remains unchanged for the other projects.

7. Michigan DNR is correct. Article 409 of each license specifies the amount to be paid to the Habitat Account, and Consumers must pay that amount until such time as its licenses require otherwise. Accordingly, we rescind the extension of time to calculate FY 2003 payments to the Habitat Account for the ten licenses for projects other than Foote, and direct Consumers to submit, within 60 days of the date of this order, its proposed payments. Upon Commission approval, those amounts will be due October 1, 2003.

⁷See, e.g., 98 FERC ¶ 61,150 (2002). On April 30, 2002, Consumers filed applications to amend its ten other licenses to reduce Article 409 contributions based on extrapolations from mortality analyses for other projects, including Foote. Those applications are under review. On the same day, Consumers asked the Commission for clarification of the FY 2001 and 2002 amounts due under Article 409 in light of the reduced payments Consumers seeks in its amendment applications. Those filings are also under review.

8. In addition, Michigan DNR states that Consumers has not yet made its payment to the Habitat Account for FY 2001,⁸ and asks the Commission to direct Consumers to do so. The issue of amounts owed for years other than FY 2003 is however beyond the scope of this proceeding. It will be dealt with in the context of the pending April 30, 2002 requests for clarification of the amounts due for FY 2001 and 2002.⁹

The Commission orders:

(A) The request for rehearing and clarification filed on April 10, 2003, by the Michigan Department of Natural Resources is granted to the extent set forth in this order.

(B) Within 60 days of the date of this order, Consumers Energy Company must file for Commission approval Consumers' proposed expenditure under Article 409 of the licenses for Project Nos. 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2468, 2580, and 2599.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁸For FY 2001, Consumers owes \$265,165 (the amount specified in Article 409 of the licenses, adjusted by crediting an earlier Foote overpayment).

⁹See n.7.